In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD, PETITIONER

v.

MAJOR GENERAL CHARLES R. BOND, JR., COMMANDER, TWELFTH AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS SUGGESTING MOOTNESS

Petitioner, an Air Force Captain, was stationed at Cannon Air Force Base, New Mexico. On March 8, 1968, he was convicted by a general court-martial of wilfully refusing to obey the order of his superior officer to fly as an instructor with a student pilot. He was sentenced to one year's confinement at hard labor, forfeiture of all pay and allowances, and dismissal from the Air Force. The convening authority approved the sentence on May 10, 1968, and designated the United

States Disciplinary Barracks at Fort Leavenworth, Kansas, as the place of confinement pending completion of military appellate review (Pet. 13a-14a). On September 3, 1968, the Air Force Board of Review affirmed the conviction (Pet. 15a-27a). A petition for review is presently pending before the United States Court of Military Appeals.

The validity of that conviction is not at issue in this collateral proceeding. The sole question sought to be raised in this proceeding concerns the nature of the restraint which the military may impose on petitioner, pending final military review of his conviction. But petitioner's sentence to confinement has completely expired and therefore the question of allowable physical restraint is, as petitioner has recognized, presently moot.[1]

The facts indicating mootness are these: After the convening authority designated Fort Leavenworth as the place of confinement pending appellate review, petitioner brought this action for habeas corpus in the District Court for the District of New Mexico, challenging the proposed transfer to Leavenworth and seeking to be released from the restraint of confinement to quarters, which had been ordered immediately following his sentence. The district judge held that a transfer to the barracks at Fort Leavenworth would be partial "execution" of the sentence prior to appellate review, in violation of 10 U.S.C. 871(c), and or-

[1] Of course, the mootness of his collateral challenge to the form of restraint in no way impairs the vitality of his seperate appeal from the conviction. See *Peyton* v. *Rowe*, 391 U.S. 54; *Carafas* v. *LaVallee*, 391 U.S. 234.

dered petitioner relieved from the transfer order. He refused, however, to order petitioner's release from confinement to quarters, ruling that this was a matter for the exercise of discretion by the appropriate military authorities (Pet. 7a-12a). Thereafter the Air Force rescinded the transfer order and directed that petitioner be restricted, under guard, to a room in the Visiting Officer's Quarters. On cross-appeals, the court of appeals held (Pet. 1a-6a) that the district court should not have entertained the action, since petitioner had not exhausted his available military remedies, including an application to the Court of Military Appeals for an extraordinary writ, in accordance with *Levy* v. *Resor*, 17 U.S.C.M.A. 135. The court of appeals accordingly reversed the granting of partial relief to petitioner. The instant petition for a writ of certiorari seeks review of that judgment refusing to inquire into the form of physical restraint imposed upon petitioner.

Before applying for certiorari, however, petitioner filed an application with the Circuit Justice seeking release from restraint pending the disposition of the present petition. The application was sought on the ground that such relief was necessary to prevent the issue sought to be raised from becoming moot, since petitioner's one-year sentence, taking into account the time credited for good behavior, was to expire on December 26, 1968.[2] The government opposed the appli-

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[2] Even though 10 U.S.C. 871(c) precludes execution of a sentence before review is completed, under 10 U.S.C. 857(b) "[a]ny period of confinement included in a sentence of a court-

cation on the ground that petitioner was clearly not entitled to be released from the restraint of confinement to quarters, see *Levy* v. *Resor*, 17 U.S.C.M.A. 135 and *Levy* v. *Resor*, 384 F. 2d 689 (C.A. 4), certiorari denied, 389 U.S. 1049, and that the issue in any event had little significance for the future in light of a new statute passed by Congress and effective on August 1, 1969.[3] On December 18, 1968, the Circuit Justice denied the application. On December 24, 1968, Mr. Justice Douglas, to whom the application had then been referred, ordered that, until the full Court had an opportunity to pass on the petition, petitioner "should be placed in a non-incarcerated status, which as the District Court said, should prevent his superiors from 'assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure him as a practical

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martial begins to run from the date the sentence is adjudged by the court-martial," unless the sentence is "suspended". (Suspension of sentence means only a disposition akin to placing a defendant on probation. *United States* v. *May*, 10 U.S.C.M.A. 358.) No order suspending petitioner's sentence was issued, and his sentence thus continued to run from March 8, 1968, the date on which he was sentenced.

[3] The Military Justice Act of 1968 (82 Stat. 1335) *inter alia* amends 10 U.S.C. 857 to provide for a system similar to that of bail in the civilian courts, whereby the officer having jurisdiction over a person convicted by general court-martial will have the power "in his sole discretion [to] defer service of the sentence to confinement," in which event the sentence will not run until it is ordered executed (82 Stat. 1341). The deferment will not, like suspension of a sentence, result in probationary status for the prisoner but will have the effect of a release on personal recognizance, permitting normal duties pending appellate review of the conviction.

matter'." [4] That order did not, however, interrupt the running of petitioner's sentence to confinement. On December 26, 1968, that portion of the sentence was completed and petitioner is no longer subject to any physical restraint under it. It is apparent, therefore, that the present action, seeking relief from physical restraints, is now moot. In accordance with customary practice, the petition should be granted, the judgment below vacated, and the cause remanded with directions to dismiss as moot.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1969.

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[4] Mr. Justice Douglas was quoting from the opinion of District Judge Doyle (Pet. App. 28a-30a) in *another* litigation brought by petitioner, *before* he was court-martialed. As petitioner points out (Pet. 6-7), the preliminary injunction explained in the quoted language was later vacated by the district judge, with the court of appeals affirming the denial of relief and this Court denying certiorari.

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